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(1) Supreme Court, U.S.
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In the Supreme Court of the United States

TIMOTHY J. ELMES,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI WITH APPENDIX

Charles E. McFarland
Counsel of Record
LAW OFFICE OF CHARLES E. MCFARLAND
338 Jackson Road
New Castle, Kentucky 40050
(502) 845-2754

Counsel for Petitioner

THE LEX GROUP DC • 1750 K Street N.W. • Suite 475 • Washington, DC 20006
(202) 955-0001 • (800) 815-3791 • Fax: (202) 955-0022 • www.thelexgroupdc.com

QUESTION PRESENTED FOR REVIEW

In § 1277(c)(1) of the Tax Reform Act of 1986 Congress authorized the execution of a tax implementing agreement between the United States and the United States Virgin Islands. A tax treaty called the Tax Implementation Agreement was executed in 1987.

The question raised is, "Where there is a Tax Implementation Agreement between the United States and its possession, United States Virgin Islands, does a United States Internal Revenue agent have the authority to issue third-party summonses in the United States, which target a bona fide resident of the United States Virgin Islands, without being requested to do so by the competent authority of the United States Virgin Islands?"

LIST OF ALL PARTIES

The caption of the case in this Court contains the names of all parties (Petitioner: "Timothy J. Elmes" and Respondent: "United States of America").

DISCLOSURE OF CORPORATE AFFILIATIONS AND FINANCIAL INTERESTS

Pursuant to Supreme Court Rule 29.6, Timothy J. Elmes states:

1. He is not a subsidiary or affiliate of a publicly owned corporation; and

2. There is no publicly owned corporation that is not a party to this petition that has an interest in the outcome.

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PETITION FOR WRIT OF CERTIORARI

The Petitioner respectfully petitions the Supreme Court for a Writ of Certiorari to review the February 1, 2008 judgment of the United States Court of Appeals for the 11th Circuit in *Elmes v. United States*, 020108 FED11, 07-11029.

OPINIONS BELOW

The Magistrate's Report and Recommendation (Appendix 14a) and District Court Order (Appendix 10a) (per Judge Donald L. Graham) in *Elmes v. United States*, Case #0:06-cv-60501-DLG were not published. The 11th Circuit Court of Appeal's opinion (per Circuit Judges Tjoflat, Marcus and Wilson) affirming the District Court's Order is unpublished (Appendix 1a), but is cited as *Elmes v. United States*, 020108 FED11, 07-11029. A motion for rehearing *en banc* was denied, but not published (Appendix 27a), nor was a stay of mandate sought.

STATEMENT OF JURISDICTION

The 11th Circuit Court of Appeals entered its opinion and order on February 1, 2008 and the Motion for Rehearing *en banc* was denied on May 1, 2008. Petitioner invokes the Supreme Court's jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The primary statutes involved are 48 U.S.C. § 1397, the relevant portions of 26 U.S.C. § 932 and 1986 Tax Reform Act, known as TRA, P.L. 99-514 § 1277(c)(1) are fully set forth in the body of the Petition.

STATEMENT OF THE CASE

A. Procedural History

Contrary to a tax treaty between the United States (hereinafter referred to as the "US") and the United States Virgin Islands (hereinafter referred to as the "US VI"), two third-party IRS summonses were issued and served seeking financial data and information on Timothy J. Elmes for the years 2002, 2003, and 2004. Petitioner Elmes, appearing pro se, timely filed a petition to quash the third-party summonses on April 4, 2006. Elmes later obtained counsel who filed a 2nd Amended Petition to Quash third-party summonses in which he challenged the IRS Agent Keelan's authority to issue the summonses because of Elmes' bona fide residency status in the US VI. Counsel appeared on Elmes' behalf at the hearing addressing the amended petition on October 25, 2006.

After the hearing Magistrate O'Sullivan issued a Report and Recommendation (hereinafter referred to as "R&R") denying the Petition to Quash. Elmes timely objected. District Court Judge Graham issued an order approving the R&R on January 31, 2007. Elmes filed a timely Notice of Appeal on February 21, 2007. Judge Graham issued the final order closing the case on February 28, 2007.

After oral argument on January 31, 2008, the 11th Circuit Court of Appeals on February 1, 2008 issued a non-published opinion upholding the decision of the District Court. A Motion for

Rehearing *en banc* was filed and it was denied on May 1, 2008.

B. Statement of Facts

In 1986 Congress passed the 1986 Tax Reform Act (hereinafter referred to as the "TRA"), P.L. 99-514. § 1274(a) of the Act was codified in the Internal Revenue Code as 26 U.S.C. § 932(a). Through § 932(a) Congress allowed an individual who was a bona fide resident of the US VI at the close of the taxable year to file tax returns with the Bureau of Internal Revenue (hereinafter referred to as the "BIR" or "US VIBIR") of the US VI. Elmes filed tax returns for the years 2002, 2003, and 2004 with the US VIBIR as a bona fide resident of the US VI. Elmes' returns were accepted and processed by the US VIBIR and he was audited by US VIBIR. While the US VIBIR was examining Elmes, IRS Agent Jim Keelan issued third-party summonses to third-party record keepers of Elmes. Keelan claimed that the issuance of the third-party summonses was a part of his investigation for the same years. Keelan was a revenue agent for the US IRS. Keelan stated two reasons for his investigation. The first was that he was investigating to "determine the correct federal income tax liability of Timothy Elmes." The second, but underlying and primary, reason for the investigation and subsequent issuance of third-party summonses was to determine if Elmes was a bona fide resident of the US VI. Keelan acknowledged he was aware that Elmes was claiming the status of a bona fide resident of the US VI. Agent Keelan did not follow the procedures set forth in the tax treaty, i.e. Tax Implementation Agreement (hereinafter

referred to as the "TIA"), the United States had with the US VI. The TIA was required by Congress through § 1277(c)(1). The full TIA is included in the Appendix at 29a. § 1277(c)(1) was not codified in the Internal Revenue Code. Instead it is referenced in a footnote under 26 U.S.C. § 931.

The primary issues raised by Elmes in his 2nd Amended Petition to Quash were 1.) the summonses issued by Keelan were for an improper purpose; and 2.) the procedures set forth in the TIA between the governments of the US and the US VI were not followed. Elmes maintained that these two defects caused the issuance of the third-party summonses not to meet the requirements of *United States v. Powell*, 379 U.S. 48 (1964) and therefore rendered them invalid.

Ultimately, the District Court accepted the R&R of the Magistrate that the IRS did not have to comply with the procedures set forth in the TIA. The decision of the 11th Circuit on February 1, 2008 upheld that ruling. A motion for a rehearing en banc was denied on May 1, 2008.

REASONS FOR GRANTING THE WRIT

Elmes is mindful of the criteria set forth in Supreme Court Rule 10 which are used to determine whether the Court should review a decision of an appellate court. The criteria which are applicable in this case are:

> 1.) a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.
>
> 2.) a United States court of appeals has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;
>
> 3.) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter;

Elmes is also mindful of the recent comments by U.S. Supreme Court Justices Scalia and Breyer from their appearance at the American Constitution Society and the Federalist Society event in Washington D.C. on December 5, 2006, which was recorded and posted on the C-SPAN web site at: rtsp://video.cspan.org/60days/ac010607.rm:

> We cannot judge a Judge simply on the basis of whether we like the outcome of the case. ... However, there is an implied responsibility to do so; when a panel of [Appellate] Judges fails to interpret the statutes reasonably,

> Judges are supposed to interpret the statutes reasonably even if they don't agree with them, because it is not up to them to decide what garbage law is. ... The only objective criteria [for an Appellate panel to make it's determination] are the words adopted by Congress and once you get away from giving them their fairest meaning, we are in trouble. [Justice Scalia]
>
> Subjective judgment of a Judge should not play a significant role in the outcome of the case. ... [Justice Breyer]

With these principles in mind, Elmes believes that in affirming the Magistrate's R&R and the District Court's Order the panel misapprehended certain legal and factual issues. These misapprehensions are contrary to Supreme Court decisions and other circuit court decisions. The panel also departed from the normal and usual course of judicial proceedings by not upholding the law as passed by Congress and disregarding the tax treaty known as the TIA.

ARGUMENT FOR ISSUE PRESENTED FOR REVIEW

Where there is a Tax Implementation Agreement between the United States and its possession, United States Virgin Islands, does a United States Internal Revenue agent have the authority to issue third-party summonses in the United States, which target a bona fide resident of the United States Virgin Islands, without being requested to do so by the competent authority of the United States Virgin Islands?

A. Introduction.

The answer to the question raised in the issue is NO! Yet, the District Court, as affirmed by the 11th Circuit panel decision, erroneously answered the question yes. The panel's decision disregarded a long history and line of 3rd Circuit decisions.

Petitioner Timothy J. Elmes timely appealed from an adverse decision of the Southern District of Florida, Case #0:06-cv-60501-DLG. In its February 1, 2008 opinion the panel upheld the decision of the District Court. In reaching its decision the panel made several legal errors.

The panel denied his petition for Rehearing *En Banc* on May 1, 2008 in which Elmes outlined that the panel had overlooked and misapprehended certain legal issues, and failed to interpret the law as passed by Congress as it pertains to the tax treaty between the United States and the United States

Virgin Islands in upholding the District Court's decision.

In addressing the issue presented by Elmes, there are two sub-issues that must be tackled before there can be a complete resolution. The sub-issues begin with the underlying question of whether the US and the US VI are separate taxing jurisdictions. Once it has been determined that the US VI is a separate taxing jurisdiction, the next question is whether the procedures set forth in the TIA between the US and the US VI must be followed by the US IRS when investigating a bona fide resident of the US VI. When this question is answered it becomes clear that a US IRS agent lacking competent authority has no independent authority to investigate a bona fide resident of the US VI, as the 3rd Circuit in *Dudley v. Commissioner*, 258 F.2d 182 (3rd Cir. 1958) has conclusively established, contrary to the 11th Circuit's panel decision.

B. Sub-issue 1

Is the United States Virgin Islands a separate and distinct taxing jurisdiction from the United States?

1. Certiorari is merited because the 11th circuit's decision conflicts with decisions of other United States Courts of Appeals on the same important matter.

The Magistrate's R&R, the District Court's ruling and the 11th Circuit's decision against Elmes all overlooked the long history of the status of the

US VI as a separate taxing authority from the United States. The result of such an arbitrary decision has created havoc in the economy of the VI.

The decision of the panel that the issuance of the third-party summonses by agent Keelan was proper was based on the erroneous pre-supposition that the United States IRS had jurisdiction over bona fide residents of the US VI. The decision erroneously presumes that the US and the US VI are not separate taxing jurisdictions.

The long history of the US VI taxing structure clearly establishes that the pre-supposition utilized by the 11th Circuit is faulty.

The US VI became a possession of the United States in 1916 when it was purchased from the King of Denmark and it became an unincorporated territory of the US. Since the US VI is a territory and not a sovereign state, it must rely on Congress to give it power to tax its citizens, *H.I. Hettinger & Co. v. Municipality of St. Thomas and St. John*, 187 F.2d 774, 776 (3rd Cir. 1951). Six years after the purchase Congress gave it that authority by imposing the US Internal Revenue Code (hereinafter referred to as "US IRC") on the US VI. This was done through the Naval Service Appropriations Act of 1922 as set forth in 48 U.S.C. § 1397. § 1397 states,

> "The income-tax laws in force in the United States of America and those which may hereafter be enacted shall be held to be likewise in force in the

> Virgin Islands of the United States, except that the proceeds of such taxes shall be paid into the treasuries of said islands: Provided further, That, notwithstanding any other provision of law, the Legislature of the Virgin Islands is authorized to levy a surtax on all taxpayers in an amount not to exceed 10 per centum of their annual income tax obligation to the government of the Virgin Islands."

The effect of § 1397 was to create a unique tax system in the US VI. It was a tax system that operated similar to what would happen if a foreign country had adopted the US IRC and imposed it on its citizens the same way that the US enforced the IRC on its own citizens.

Until 1935 the taxing authorities did not treat the US VI as a separate taxing authority, but treated the US VI as a collection district of the US. This changed in 1935 when Treasury Ruling I.T. 2946, XIV-2 C.B. 109 (1935) acknowledged the US VI as a taxing jurisdiction that was separate and distinct from the US. The Treasury Ruling gave the basis for the current tax structure of the US VI. The primary aspect of the 1935 Treasury Ruling was that, even with identical tax codes, the US and the US VI are separate and distinct taxing jurisdictions. The Treasury Ruling was consistent with 48 U.S.C. § 1397 and did not create a new taxing structure. It merely acknowledged what § 1397 created. This was confirmed by the 3rd Circuit in *Dudley, supra,* 258 F.2d at 184.

Another result of the 1935 Treasury Ruling was the introduction of the "mirror system" of the two tax codes. Under the "mirroring system" the tax code in the US VI was the same as the US IRC, but the words "Virgin Islands" was supposed to be substituted wherever the words "United States" appeared and vice versa, see *Great Cruz Bay, Inc., St. John Virgin Islands v. Wheatly*, 495 F.2d 301, 303 (3rd Cir. 1974); and *Chicago Bridge & Iron Co., Ltd. v. Wheatley*, 430 F.2d 973, 975 (3rd Cir. 1970). The Third Circuit case of *Johnson v. Quinn*, 821 F.2d 212, 213-214 (3rd Cir. 1987) gives a detailed explanation of how the mirroring tax system operates. The mirror system is still in effect, but was slightly limited in 1986 by the TRA. The most recent case confirming the mirroring tax system is *Chase Manhattan Bank, N.A. v. Gov't of the Virgin Islands*, 300 F.3d 320 (3rd Cir. 2002).

Through the mirroring of the tax codes a citizen of the US who is not a permanent resident of the US VI is considered as an alien to the US VI for US VI tax purposes. The result was that a US citizen who resided in the US VI on a temporary basis was called a resident alien. Correspondingly, a US citizen who did not reside in the US VI was called a nonresident alien. This terminology is important in understanding later court decisions such as the case of *In Re Various Orders to Show Cause*, 61 A.F.T.R.2d 88-629 (D.C. VI 1988), which will be briefly discussed later and other 3rd Circuit cases.

While the taxing structure of the US VI was evolving, the governmental structure was also evolving, and in 1960 the two crossed paths. At its

beginning as a territory of the US, the United States Navy governed the US VI. Later the responsibility of the government was transferred to the Department of the Interior. Local government began to be established in 1936 with a more detailed structure being set forth in the Revised Organic Act of 1954, 48 U.S.C. § 1541 et seq. See *Smith v. Government of Virgin Islands*, 375 F.2d 714, 719 (3rd Cir. 1967).

In 1960 an IRS Revenue Ruling was issued which had significant effects on the taxing structure of the US VI. Revenue Ruling 60-291, 1960-2 C.B. 407 introduced the concept of a bona fide resident to the US VI taxing structure. The ruling established that the Revised Organic Act allowed a US citizen domiciled in the US VI to qualify as a US VI resident if he met the bona fide resident test set forth in the IRC under 26 U.S.C. § 911(a)(1) (1954). § 911(a)(1) was later changed to § 911(d)(5).

After the Revenue Ruling in 1960 the IRS was inconsistent in its treatment of the unique tax structure of the US VI. On the one hand, the IRS treated the US VI as if it were a foreign taxing jurisdiction. It allowed the US VI to collect its own taxes and recognized that US citizens meeting the bona fide residency test would reap special treatment. Yet at the same time, the IRS allowed the resident alien US citizens to satisfy their US tax liabilities, including tax liabilities from sources within the US, by making payments to the US VI Treasury.

The bona fide residency test coupled with the mirror system of taxation and the inconsistent

treatment by the IRS evolved into a gigantic loophole for resident aliens of the US VI, especially for corporations. The loophole became obvious through the case of *Danbury v. Olive*, 627 F. Supp. 513 (DC VI 1986).

Danbury, Inc. was a corporation organized in Nevada, but maintained its only office in the US VI. As such, it met the bona fide residency status. All of its income was from US sources. As a direct result of the mirroring system and bona fide residency status, the corporation was able to legally shield all of its US income from both US and US VI taxes. The huge tax shelter exposed by the activities of Danbury, Inc. was legally permissible according to the court. In acknowledging the legality of the loophole the court took the position that it was the responsibility of Congress to close the loophole. Supporting this observation is the case of *In Re Various Orders to Show Cause*, *supra*, which addressed numerous issues raised by resident alien corporations attempting to take advantage of the legal tax shelter in the US VI.

While Congress did attempt to address some of the problems with the US VI tax structure, it wasn't until the 1986 Tax Reform Act, known as TRA, P.L. 99-514 that significant changes were made. Three changes that are pertinent to Elmes and this Petition are:

1.) the act amended 26 U.S.C. § 7651(5)(B) which effectively repealed the residency rule and eliminated the tax shelter exposed by *Danbury*;

2.) the act created a new section 26 U.S.C. § 932 which provided for the coordination of the incomes for the US and the VI; and

3.) the act provided for the creating of a tax implementing agreement between the US and the VI.

§ 1275(b) of TRA amended § 7651(5)(B) to provide that the Revised Organic Act will not affect any person's tax liability to the US. This effectively eliminated the mirroring effect that contributed to the loophole addressed in the *Danbury, Inc.* case.

§ 1274(a) of TRA added a new 26 U.S.C. § 932. Of particular interest is § 932(c). It provides,

(c) Treatment of Virgin Islands residents

(1) Application of subsection
This subsection shall apply to an individual for the taxable year if -

(A) such individual is a bona fide resident of the Virgin Islands at the close of the taxable year, or

(B) such individual files a joint return for the taxable year with an individual described in subparagraph (A).

(2) Filing requirement

Each individual to whom this subsection applies for the taxable year shall file an income tax return for the taxable year with the Virgin Islands.

(3) Extent of income tax liability

In the case of an individual to whom this subsection applies in a taxable year for purposes of so much of this title (other than this section and section 7654) as relates to the taxes imposed by this chapter, the Virgin Islands shall be treated as including the United States.

(4) Residents of the Virgin Islands

In the case of an individual who is a bona fide resident of the Virgin Islands at the close of the taxable year and who, on his return of Income tax to the Virgin Islands, reports income from all sources and identifies the source of each item shown on such return, for purposes of calculating income tax liability to the United States gross income shall not include any amount included in gross income on such return.

Accordingly, pursuant to § 932, if a US citizen was able to establish his residency in the US VI as of the last day of the taxpayers taxable year, he would be able to satisfy all of his US tax obligations by paying the tax on all sources of income to the US VI. He would not have a tax liability to the US. The addition of subsection 932(e) partially prevents the two way mirroring, as described in *Danbury*, *supra*, effectively allowing tax on US VI income sources to be paid directly to the US VI.

Also, as part of TRA, Congress provided for the TIA by enacting § 1277(c)(1) which specifically provided,

> "The amendments made by section 1275(c) shall apply with respect to the Virgin Islands (and residents thereof and corporations created or organized therein) only if (and so long as) an implementing agreement is in effect between the United States and the Virgin Islands with respect to the establishment of rules under which the evasion or avoidance of United States income tax shall not be permitted or facilitated by such possession."

In direct compliance to the desires of Congress, on February 24, 1987, the United States of America and the U.S. Virgin Islands authorities entered into the TIA, see 1989-1 C.B. 347 and the Appendix 29a. The TIA specifically set forth the procedures to be followed and listed the designated

and authorized personnel to implement said procedures.

§ 1277(c)(1) of Public Law 99-514 did not become a part of Title 26, except as a note in 26 U.S.C. § 931. Nevertheless, the TIA, as a tax treaty, does have the force and effect of law pursuant to Article VI of the United States Constitution.

As the history of the US VI tax structure shows, the US and the US VI are separate and distinct taxing jurisdictions with mirrored tax codes. This was confirmed by the 3rd Circuit Court of Appeals decisions in *Dudley v. Commissioner*, 258 F.2d 182, 184 (3rd Cir. 1958); *Vitco, Inc. v. Government of the Virgins Islands*, 560 F.2d 180, 181-182 (3rd Cir. 1977); *Danbury, Inc. v. Olive*, 820 F.2d 618, 620-21 (3rd Cir. 1987); *Johnson v. Quinn*, *supra*, 821 F.2d at 214; *Abramson Enterprises, Inc. v. Government of Virgin Islands of U.S.*, 994 F.2d 140, 145 (3rd Cir. 1993); and more recently, *Chase Manhattan Bank, supra*, 300 F.3d at 322 (quoting *Danbury, Inc. supra* 820 F.2d at 620-21, "'Congress create[d] a separate taxing structure for the Virgin Islands 'mirroring' the provisions of the federal tax code except as to those provisions which are incompatible with such a separate tax structure.'"

Congress understood the US and the US VI to be separate taxing jurisdictions when it passed the 1986 Tax Reform Act, P.L. 99-514, see its legislative history at United States Code Congressional and Administrative News, 99th Congress - Second Session, 1986, Vol. 5, Legislative History, page 4767.

Furthermore, the US VIBIR understands that the US and the US VI are separate taxing jurisdictions. In its website at http://www.viirb.com/index.html, via the link for "Tax Structure Booklet," the US VI affirms that the effect of the Naval Service Appropriations Act, 48 U.S.C. § 1397 was to create a separate taxing structure in the Virgin Islands through the mirroring of the IRC. The case law, the legislative history of the 1986 Tax Reform Act and the VI are consistent in acknowledging that the tax jurisdiction of the VI is separate from the taxing jurisdiction of the US.

The effect of separate taxing jurisdictions is best explained by the case of *Holbrook v. Taitano*, 125 F. Supp. 14, 16 (DC Guam 1954) in which the court recognized that the effect of Section 31 of the Organic Act of Guam, 48 U.S.C. § 1421i made

> "the income tax laws in force in Guam in force in the United States of America, present and future, likewise was ***to create a territorial tax to be collected by the proper officials of the Government of Guam.***" (Emphasis added.)

Holbrook also recognized that it was "the practice of the United States Congress when it levied income taxes in the possessions and unincorporated territories to have such taxes paid into the local treasuries."

Even though the *Holbrook* case is a Guam case, it is noteworthy because the court noted that the language of the Organic Act of Guam was derived from the Revised Organic act of the Virgin Islands, 48 U.S.C. § 1541 *et seq.*, which provided in § 1642 that the inhabitants of the Virgin Islands,

> "shall satisfy their income tax obligations under applicable taxing statutes of the United States by paying their tax on income derived from all sources both within and outside the Virgin Islands into the treasury of the Virgin Islands."

The *Holbrook* court relied on *Laguna v. Ansell*, 102 F. Supp 919, 922 (DC Guam 1952) which recognized that the Naval Appropriations Act was construed by the United States as "establishing separate and distinct taxing jurisdictions."

Confirming this conclusion is the 9th Circuit decision of *Sayre & Co. v. Riddell*, 295 F.2d 407, 411 (9th Cir. 1968) wherein it is stated, "Congress intended that each territory should apply within its geographical jurisdiction a separate income tax system having the same basic structure as in the income tax system applied by the United States within its geographical jurisdiction."

In its decision the 11th Circuit ignored the long and established history of the taxing structure of the US VI, the numerous Third Circuit cases, and the understanding of both the US Congress and the US VIBIR. The 3rd Circuit cases are of particular

importance because the 3rd Circuit regularly addresses issues from the US VI as it is the appellate court for the District Court of the Virgin Islands. The more recent 3rd Circuit case, *Chase Manhattan Bank*, *supra*, 300 F.3d at 324-325, took great pains "to avoid confusion as to the taxing jurisdiction involved." In its decision the 3rd Circuit meticulously cited each case which dealt with "jurisdictional confusion." The cases cited were: *Dudley*, *supra*; *Chicago Bridge & Iron Co.*, *supra*; *HMW Indus. v. Wheatley*, 504 F.2d 146 (3rd Cir. 1974); *Vitco, Inc.*, *supra*; *Danbury, Inc.*, *supra*; and *Abramson Enters.*, *supra*. Accordingly, the 3rd Circuit is more familiar with the particulars of the US VI taxing system than any other appellate court.

Instead of relying on the history and the expertise of the 3rd Circuit, especially the 2002 decision in *Chase Manhattan Bank*, the 11th Circuit relied upon a recent decision from the 2nd Circuit, *Mollison v. United States*, 481 F.3d 119 (2nd Cir, 2007). The *Mollison* court also had no expertise in US VI tax matters, and by ignoring the history, court cases and understandings of Congress and the US VIBIR also made the erroneous pre-supposition that the US and US VI were not separate taxing jurisdictions.

The sub-issue is whether the US VI is a separate taxing jurisdiction from the US and the 11th Circuit opinion assumed it was not. Its opinion is in direct conflict with many of decisions in the 3rd Circuit that did rule the US VI was a separate taxing jurisdiction. Accordingly, the February 1,

2008 decision is ripe for a review by the Supreme Court.

2. Certiorari is merited because the 11th Circuit's decision addressed an important question of Federal Law that has not been, but should be, settled by the Supreme Court.

The net result of the 11th Circuit's adoption of the flawed *Mollison* decision is that the taxing jurisdiction of the US VI, confirmed by a long history of court cases, the legislative history of the 1986 TRA and the VIBIR, are totally disregarded and ignored. As a result the IRS is arbitrarily given new authority to investigate bona fide US VI residents. This new authority was granted the IRS by fiat through the 11th Circuit's panel decision. This new and arbitrary authority is not only detrimental to Elmes, but it is detrimental to all bona fide US VI residents. It is especially devastating to the economy of the US VI for which the 1986 TRA was passed to stimulate.

The Supreme Court has never addressed the important issue of whether the US and the US VI are separate taxing jurisdictions. Until the *Mollison* and *Elmes* cases were decided there was no conflict among the circuits. The 3rd Circuit has routinely and consistently held that the US VI is a separate taxing jurisdiction. The 9th Circuit in *Sayre*, *supra*, also made the same finding. The 3rd and the 9th Circuits are the only appellate courts to rule correctly regarding the separate taxing jurisdiction of the US VI. A decision that is destructive to the economy of

a US possession should not be decided arbitrarily by an appellate court with no expertise in US VI tax matters and must be reviewed by the Supreme Court.

C. Sub-issue 2

Where there is a Tax Implementation Agreement between the United States and the United States Virgin Islands, are the procedures set forth in said Agreement required to be followed before third-party summonses, which target a bona fide resident of the United States Virgin Islands, can be issued by a United States Internal Revenue agent?

1. Certiorari is merited because the 11th Circuit panel has decided an important Federal question in a way that conflicts with relevant decisions of the Supreme Court and of other circuits.

In ruling that the TIA was not applicable in Elmes' situation, the 11th Circuit decision was in direct conflict with *United States v. Stuart*, 489 U.S. 353 (1989). Recognizing that the US VI is a separate taxing authority is crucial in understanding the nature of the TIA authorized by Congress in § 1277(c)(1) of the 1986 TRA and why the 11th Circuit's opinion was incorrect in ruling that *Stuart* and subsequent appellate decisions did not apply to Elmes' situation.

Prior to 1986 both the courts and Congress recognized the separate taxing status of the Virgin Islands. In *Dudley*, *supra*, 258 F.2d at 184, the 3rd Circuit found that the Tax Court had no jurisdiction over a notice of deficiency issued by the US VI because it was "satisfied that the tax here in dispute is actually not a tax of the United States but a territorial income tax." In reference to the tax imposed by the Naval Appropriation Act, the *Dudley* court further explained,

> "That purpose has been consistently implemented by both the federal and territorial taxing authorities, who have recognized that Congress created a local, locally collectible income tax and that the United States and the Virgin Islands are distinct taxing jurisdictions although their income tax laws arise from an identical statute applicable to each. Internal Revenue rulings, the first of which was issued over twenty years ago, have taken this view. I.T. 2946, XIV-2 C.B. 109 (1935); I.T. 3690, 1944 C.B. 164. The correctness of this official interpretation and practice appears never heretofore to have been questioned, and the income tax has been administered in the Virgin Islands in accordance with this construction for over a generation. Such a settled administrative construction applied in a multitude of cases over an extended period is entitled to great weight." *Dudley*, *supra*, 258 F.2d at 185.

The 3rd Circuit in *Dudley supra*, 258 F.2d at 186, further clearly noted that "Congress itself has afforded recent evidence of its understanding and purpose that the Virgin Islands income tax is not to be administered by the Internal Revenue Service or other officers of the United States," when it choose to extend certain social security benefits to US VI residents and allowed said contributions to be administered by the US VI.

Confirming this understanding is the action taken by Congress when it passed § 1277(c)(1) of the TRA. The stated purpose of § 1277(c)(1) was that an "implementing agreement" was required to be "in effect between the United States and the Virgin Islands with respect to the establishment of rules under which the evasion or avoidance of United States income tax shall not be permitted or facilitated by such possession." That implementing agreement took the form of the Tax Implementing Agreement (TIA) signed on February 24, 1987 between the US and US VI authorities.

The TIA confirmed the separate jurisdiction of the two taxing jurisdictions in that it provided detailed procedures for the interactions between the competent authorities of the US and the US VI. It was in essence a tax treaty. A tax treaty is synonymous with a tax convention. 26 U.S.C. § 6105(c)(2)(B) defines a "tax convention" as

> "any other convention or bilateral agreement (including multilateral conventions and agreements and any agreement with a possession of the

> United States) providing for the avoidance of double taxation, the prevention of fiscal evasion, nondiscrimination with respect to taxes, the exchange of tax relevant information with the United States, or mutual assistance in tax matters."

Furthermore as acknowledged by the IRS, the TIA is recognized as a tax treaty. The tax treaty procedures of the IRS are found in the following publications of the IRS: Revenue Procedure 2002-52, updated by Revenue Procedure 2006-23; and The IRS International Procedures Handbook 4.3.1.1, Chapter 7, Mutual Agreement Procedures Report Guidelines 7.6 (2-26-1999) U.S. Possessions, updated by the January 1, 2002 version of the IRM at 4.60.3 (Part 4. Examination Process, Chapter 60. International Procedures, Section 3. Tax Treaty Related Matters.)[1] Thus, it is conclusive, from both the IRC and the IRS proceures, that the TIA is a tax convention, i.e. a tax treaty.

Support for the fact that the IRS had no authority to investigate a bona fide resident is found in *Dudley*, *supra*, 258 F.2d at 187-188. In explaining 26 U.S.C. § 7651 the court said,

> "The section of the Internal Revenue Code of 1954 comparable to section 3811 of the 1939 Code is section 7651. The taxpayer relies upon this section

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[1] The updated handbook can be found at http://www.irs.gov/irm/part4/ch46s03.html.

and it is true that there is in paragraph (2) of the section a specific provision for collection under the direction of the Secretary of the Treasury or his delegate of any tax imposed by the Code in any possession. But since this provision, by the express terms of the introductory paragraph of the section, is applicable in the Virgin Islands only to the extent not otherwise provided in section 28(a) of the Revised Organic Act it does not apply to the income tax imposed by the Code. For section 28(a), as we have seen, specifically provides that the United States income tax shall be covered and paid into the treasury of the Virgin Islands. And paragraph (5) (A) of section 7651 makes it clear that the taxes to which section 28(a) of the Revised Organic Act does not apply, and which are accordingly within the purview of section 7651, are the social security taxes levied by chapters 2 and 21 of the Internal Revenue Code of 1954, being the same taxes which were the subject matter of section 3811 of the 1939 Code. Moreover the legislative history makes it clear that paragraph (1) of section 7651 is intended to extend the revenue laws to the Virgin Islands so as to facilitate collection from delinquent continental taxpayers who may remove to the Virgin Islands or have property there. It is for this reason that the Virgin Islands are included in

> a federal internal revenue district. Thus we think that it is clear, contrary to the taxpayer's contention, that Congress did not intend by section 7651 of the Internal Revenue Code of 1954 to bring territorial officers of the Virgin Islands into the federal Internal Revenue Service or to change the preexisting law in any relevant respect. These officers are not appointed by nor under the control or authority of the Secretary of the Treasury nor are they his delegates. They are territorial and not federal officers." (Footnotes omitted)

The explanation provided in *Dudley* is clearly shown to be completely logical by the following example:

The State of Ohio has imposed an income tax on its residents. According to the flawed decisions of *Elmes* and *Mollison*, the IRS has the authority to investigate and enforce the Ohio income tax on the Ohio residents. This is absolutely not true. The State of Ohio is a separate taxing jurisdiction from the United States. While the IRS can investigate residents in Ohio for Federal income taxes, it cannot investigate an Ohio resident for Ohio income tax.

The same is true for the IRS investigating US VI tax liabilities of bona fide residents. It has no authority because the US VI is a separate taxing jurisdiction in the same manner as the State of Ohio.

The *Stuart* case along with the circuit cases of *Barquero v. United States*, 11 F.3d 1311 (5th Cir. 1994); *Lidas, Inc. v. United States*, 238 F.3d 1076, 1082 (9th Cir. 2001); and *Mazurek v. United States*, 271 F.3d 226 (5th Cir. 2001) that were cited by Elmes involved summonses to American institutions based on requests made by the various tax treaty partners (competent authorities). In each one of the foregoing cases the competent authority for the US was the International Division of the IRS. In all the cases the tax treaty partners had requested assistance from the International Division and an IRS agent from International issued the respective summonses which were the subjects of the enforcement actions. The cases turned on whether the affidavit supporting the petitions to enforce the summonses was made by an IRS agent from the International Division. The tax treaties in these cases were substantially the same as the TIA between the US and the US VI.

The claim made by the panel in the February 1, 2008 opinion is that these cases "all involved summonses issued by the IRS at the request of a treaty partner. In such cases, the treaty partner makes a request of the IRS through the provisions of the treaty." The panel failed to understand that Elmes' situation is exactly like the factual situations in the *Stuart* line of cases. Elmes is a bona fide resident of a tax treaty partner, i.e. US VI. In order for the IRS to issue a summons it must receive, through the International Division, a request from the competent authority of the tax treaty partner, i.e the US VIBIR. Without the request, according to the *Stuart* principle, the IRS does not have a legitimate

purpose in investigating the resident of a separate taxing authority. The *Lidas, Inc.*, *supra*, case firmly established that a *prima facie* good faith showing of the IRS is established under *Powell*, *supra*, 379 U.S. at 57-58 (1964) when an agent from the International Division submits an affidavit to the court indicating that the summons is being issued at the request of a tax treaty partner. The International Division of the IRS is the competent authority for the US. In Elmes' case, there was no affidavit by an agent from the International Division of the IRS.

There is no question that Elmes claimed to be a bona fide resident of the US VI when he filed his returns with the US VI. Thus, according to *Mazurek, supra,* the determination of the residency should have been left to the taxing authority where the residency is challenged.

The US VI residency of Elmes was challenged by Keelan, not the US VIBIR. Rather than Keelan, it is the US VIBIR's duty to investigate the issue of Elmes' status of being a bona fide resident, if it had any doubt about his status.

The record does not reflect that during the US VIBIR's examination of Elmes if ever requested the assistance of Keelan on the issue of Elmes' residency status. The TIA was never even considered let alone followed, by Agent Keelan. In fact, the government argued the TIA did not apply, yet cited no authority to support its position. Furthermore, the record does not reflect that an IRS agent from the International Division of the IRS issued summonses to assist the US VIBIR. Obviously, the US VIBIR did not make a

request of Agent Keelan for assistance, because Keelan is not under the International Division, nor a delegate of International. According to the TIA, such request could only be made through the competent authority, i.e. International Division of the IRS.

As a further note, Keelan is prohibited from receiving any US VI tax return information related to Elmes by § 6105 and the terms of the TIA, unless it is approved through the TIA procedures. There is nothing in the record showing that Keelan had any approval from either the competent authorities of the US International Division or the US VIBIR. Agent Keelan was investigating Elmes solely on his own initiative, not through the proper channels.

The 11th Circuit decision ruled that the provisions of the TIA are not applicable. Yet, it offered no law, case law, provision of the TIA, or procedures of the IRS that support its conclusion. As has been shown above, all these authorities clearly indicate the TIA is applicable and that an IRS agent from the US, who is not from the International Division, has no authority to issue a third-party summons concerning a bona fide resident of the US VI.

What the 11th Circuit assumes is that the IRS has authority to investigate the US VI tax liability of a bona fide US VI resident such as Elmes. This assumption has no basis in law. The US IRS simply has no authority or power to investigate or enforce the laws of the US VI, a separate taxing jurisdiction. It is the responsibility of the US VIBIR to investigate its own bona fide residents. Thus, it should have been the US VIBIR seeking the information through the US competent authority

(International Division of the IRS) in accordance to the tax treaty (TIA), exactly the way the Canadian government did in *Stuart*.

By failing to understand the true nature of the separate taxing authorities of the US and the US VI and allowing the IRS to arbitrarily exercise authority over a taxpayer of a separate taxing jurisdiction, the 11th Circuit directly ran afoul of the principles of tax treaties established in the *Stuart* case and subsequent appellate cases. Accordingly, this case is one that must be reviewed by the Supreme Court.

2. Certiorari is merited because the 11th Circuit's affirming of a District Court's decision to disregard and ignore the Tax Implementation Agreement between the United States and the United States Virgin islands and to discount Elmes' challenge to IRS Agent Keelan's authority to issue third-party summonses targeting a bona fide resident of the US VI has so far departed from the accepted and usual course of judicial proceedings and has sanctioned such a departure by the District Court as to call for an exercise of the Supreme Court's supervisory power.

There are two primary areas in which the 11th Circuit sanctioned departures from the accepted and usual course of judicial proceedings. The first area

involves the District Court and the 11th Circuit panel's refusal to acknowledge a law passed by Congress and disregarded the resulting tax treaty. As detailed earlier Congress passed § 1277(c)(1) as part of the TRA of 1986. § 1277(c)(1) was not codified in the IRC. But it was referenced in a footnote to § 931.

§ 1277(c)(1) authorized the creation of an implementing agreement between the US and the US VI for the primary purpose of preventing income tax evasion and avoidance. The US and the US VI did execute a TIA in 1987. The TIA stated several purposes for its existence, among which were 1.) exchange of information; and 2.) prevention of income tax evasion or avoidance. Both of these purposes are stated in the Introduction to TIA and Article 1 (29a of Appendix). Furthermore, according to Article 7, Section 6 of the TIA (42a of Appendix), the implementation of the agreement would result in a "cooperative return selection and examination program with the objective of avoiding unnecessary duplication of examination coverage."

While Elmes was being examined by the US VIBIR, IRS Agent Keelan began his own examination of Elmes. Because Keelan's examination was asking for much of the same information for the same years already provided to the US VIBIR by Elmes, it was also in direct violation of the "objective of avoiding unnecessary duplication of examination coverage."

Elmes presented to the District Court § 1277(c)(1) and the TIA and requested the District Court to honor the intentions of Congress and the

resulting tax treaty. The District Court instead followed the fallacious argument of the government that the TIA was not applicable. In so doing the District Court violated one of the primary reasons for its existence, i.e to enforce the laws and treaties passed or authorized by Congress.

Article VI, ¶2 of the Constitution of the United States in part states, "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land." § 1277(c)(1) and the TIA are the supreme law of the land and the District Court chose to disregard and ignore both.

The District Court and the IRS are not above the supreme law of the land. The case of *Olpin v. Commissioner*, 270 F.3d 1297, 1300 (10th Cir. 2001) sets forth a well settled legal principle that was ignored by the 11th Circuit panel. The principle is, "The Supreme Court has stated that 'explicit statutory requirements [ ] must be observed and are beyond the dispensing power of Treasury officials.'" The *Olpin* court was quoting from *Angelus Milling Co. v. Commissioner*, 325 U.S. 293, 296 (1945) and citing *Lucas v. Pilliod Lumber Co.*, 281 U.S. 245 (1930) for its stated principle. In other words, neither the IRS officials nor the courts can disregard and ignore the requirements of a law passed by Congress or a tax treaty authorized by Congress and duly executed by the respective treaty partners.

By disregarding and ignoring the law as passed by Congress and refusing to enforce the TIA

which was authorized by Congress, both the District Court and the 11th Circuit panel effectively indicated that the voice of the IRS was more persuasive than the proclamations of Congress. This is an extremely grave departure from the accepted and usual course of judicial proceedings and requires the Supreme Court to exercise its supervisory powers to rectify the error.

For the foregoing reasons the Supreme Court must exercise its supervisory powers over the 11th Circuit and the District Court and remind both courts as well as the IRS, that the laws passed by Congress are the supreme law of the land unless found unconstitutional, which was not the case here.

The second area in which the 11th Circuit sanctioned a departure from the accepted and usual course of judicial proceedings is the refusal to require an IRS agent to establish his authority when challenged.

In his 2nd Amended Petition to Quash, Elmes made it clear that he was challenging the authority of Keelan to issue the third-party summonses on the basis of the TIA. It is well settled law that all citizens, and this includes courts as well, have a duty to ascertain the authority of a government agent, see *Stuart*, *supra*, and appellate cases following *Stuart*, for examples of courts requiring an IRS agent to show his authority.

It is well-settled law that government agents must operate within the confines of their authority. The Supreme Court in *Federal Crop Ins. Corp. v. Merrill*, 332 U.S. 380 (1947), noted the clear duty

and long standing principle that persons dealing with the government must verify the authority being exercised. The Supreme Court stated,

> "Whatever the form in which the government functions, anyone entering into an arrangement with the government takes the risk of having accurately ascertained that he who purports to act for the government stays within the bounds of his authority. The scope of this authority may be explicitly defined by Congress or be limited by delegated legislation, properly exercised through the rule-making power, and this is so even though, as here, the agent himself may have been unaware of the limitations of his authority." *Federal Crop Ins. Corp. v. Merrill*, 332 U.S. 380 (1947).

In other words, the source of an agent's authority or an agency's power is derived from two sources: that authority explicitly determined by statute passed by Congress or that authority that has been provided through delegation. If either of these two sources are lacking, the authority exercised is void.

As a matter of law, it is essential for a federal employee to possess delegated authority to perform any particular act. The absence of delegated authority means that the act in question was beyond the scope of the employee's duties, and therefore unlawful.

The Supreme Court has held that the rules regarding the necessity for a government employee to have delegated authority to act apply with equal force in the field of tax law. In *Botany Worsted Mills v. United States*, 278 U.S. 282, 288-289 (1929), the Botany Worsted Mills and a subordinate revenue agent entered into an informal compromise agreement regarding the tax liability of the company. That agreement was held invalid on the ground that the agent lacked delegated authority to make the agreement. See also *Louisiana Pub. Svc. Comm'n v. FCC*, 476 U.S. 355, 374 (1986), ("an agency literally has no power to act ... unless and until Congress confers power upon it").

IRS Agent Keelan claimed to have the authority to investigate a bona fide resident of the US VI. When challenged by Elmes, even though Keelan failed to prove said authority, he was nevertheless protected by the District Court. The court protected Keelan by never requiring him to establish his authority. The long history of the US VI tax system, the acts of Congress and the TIA all clearly indicate that Agent Keelan was operating outside his legal authority. The TIA specifically stated that the US VIBIR was "charged with the responsibility for the administration of Possession taxes imposed on income, ..." See Section 2.1 of the TIA at 49a of the Appendix. Yet, when Elmes brought this to the attention of the District Court, as was his legal duty and obligation, the challenge was discounted as having no legal foundation.

Because the District Court allowed an IRS Agent to initiate an action in a US court against a

bona fide resident of the US VI for which he lacked authority, the Supreme Court needs to exercise its supervisory powers over the 11th Circuit and the District Court and remind both courts that government agents must operate and remain within the confines of their authority.

CONCLUSION

Elmes has shown that the 11th Circuit, when it rendered its unpublished decision of February 1, 2008, it 1.) disregarded and ignored the separate taxing jurisdiction status of the USVI from the US and, 2.) arbitrarily allowed the IRS to by-pass and effectively eviscerate a tax treaty mandated by Congress to coordinate efforts of the two taxing authorities that not only harmed Elmes, it also began the devastation of the economy of the US VI.

Elmes has further shown that the 11th Circuit's rejection of the tax treaty principles in *Stuart* is not consistent with the fact the IRS does not have Congressional authority to investigate subjects of another taxing jurisdiction for tax liabilities.

The decision made on February 1, 2008 by the 11th Circuit panel 1.) is in conflict with decisions of the Supreme Court; 2.) is in conflict with decisions of other circuits; and 3.) clearly departed from the acceptable and usual course of judicial proceedings and requires the Supreme Court to exercise its supervisory powers to rectify the error.

Furthermore, the issues raised are very important to all the residents of the US VI in that the decisions of the US IRS to arbitrarily insert itself into the tax administration of the US VI has created havoc with the US VI's economic stability. Because of the importance of the issue and because the Supreme Court has never addressed the tax structure of the US VI, Petitioner Elmes respectfully requests the Supreme court to grant the Writ of Certiorari and hear the issue on the merits.

Respectfully submitted this 29th day of July, 2008.

/s/
Charles E. McFarland
Counsel of Record
LAW OFFICE OF CHARLES E. MCFARLAND
338 Jackson Road
New Castle, Kentucky 40050
(502) 845-2754

Counsel for Petitioner

APPENDIX

ENTERED FEBRUARY 1, 2008

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 07-11029

D. C. Docket No. 06-60501-CV-DLG

TIMOTHY J. ELMES,

Plaintiff-Appellant,

versus

UNITED STATES OF AMERICA,
through Internal Revenue Service,
through Kim Keelan, Revenue Agent,

Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Florida

(February 1, 2008)

Before TJOFLAT, MARCUS and WILSON, Circuit Judges.

PER CURIAM:

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
FEB 1,2008
THOMAS K. KAHN
CLERK

At issue in this appeal is whether the United States District Court for the Southern District of Florida properly enforced two summonses served on American Express and Northern Trust Bank, respectively, by the Internal Revenue Service ("IRS"). After thorough review, we affirm.

I.

In 2002, Timothy J. Elmes claimed to be a resident of the Virgin Islands and ceased filing his U.S. tax returns. On March 22, 2006, IRS Agent Jim Keelan issued summonses to the South Florida custodians of American Express and Northern Trust Bank requesting bank account and credit card statements, correspondence, and billing address information to determine whether Elmes was a resident of the United States during the years 2002 through 2004.

Elmes petitioned to quash the summonses, and the Government thereafter moved to dismiss his petition and to enforce the summonses. Along with that motion, the Government included an affidavit signed by Agent Keelan declaring that the summonses complied with the four factors laid out by the Supreme Court in United States v. Powell, 379 U.S. 48, 57-58 (1964). On January 26, 2007, the district court denied Elmes' petition and ordered the enforcement of both summonses. This timely appeal followed.

II.

"An order enforcing an IRS summons will not be reversed unless clearly erroneous." United States v. Medlin, 986 F.2d 463,466 (11th Cir. 1993).

Pursuant to 26 U.S.C. § 7602, "the Secretary of the Treasury, or the IRS as his designee, may examine any books, papers, records, or other data which may be relevant or material to ... ascertaining the correctness of any return and may issue summonses to those in possession, custody, or care thereof to appear and produce them to the IRS." La Mura v. United States, 765 F.2d 974, 979 (11th Cir. 1985) (citation and internal quotation marks omitted).[1] The "IRS' power to investigate" under 26 U.S.C. § 7602 is "broad and expansive." Id. (citation and internal quotation marks omitted). "This authority, however, is not unbounded. The subject of an IRS investigation may petition to quash a third-party summons pursuant to 26 U.S.C. § 7609(b)," and a "now-familiar scheme of shifting burdens, designed to ensure only the basic propriety of the

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[1] In pertinent part, 26 u.s.c. § 7602(a) provides:
For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, the Secretary is authorized -

(1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry;

(2) To summon the person liable for tax or required to perform the act, or any officer or employee of such person, or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax or required to perform the act, or any other person the Secretary may deem proper, to appear before the Secretary at a time and place named in the summons and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry[.]

investigation, applies to such petitions." Mollison v. United States, 481 F.3d 119, 122 (2d Cir. 2007) (per curiam).

First, the Government must establish a prima facie case for enforcement of the summons by satisfying each of the four factors laid out by the Supreme Court in Powell. Medlin, 986 F.2d at 466. Specifically, the Government must demonstrate "[1] that the investigation will be conducted pursuant to a legitimate purpose, [2] that the inquiry may be relevant to the purpose, [3] that the information sought is not already within the IRS' possession, [and 4] that the administrative steps required by the Code have been followed." Id. (citation and internal quotation marks omitted). In addition, the Government must show that no "Justice Department referral is in effect with respect to such person." 26 U.S.C. § 7602(d)(1). "The IRS may satisfy its minimal burden merely by presenting the sworn affidavit of the agent who issued the summons attesting to these facts." Medlin, 986 F.2d at 466 (citation and internal quotation marks omitted). "Thereafter, the burden shifts to the party contesting the summons to disprove one of the four elements of the government's prima facie showing or convince the court that enforcement of the summons would constitute an abuse of the court's process." La Mura, 765 F.2d at 979-80. "The taxpayer's burden is a heavy one, which he must meet by disproving the actual existence of a valid civil tax determination or collection purpose by the IRS." Mollison, 481 F.3d at 123 (citation and internal quotation marks omitted).

Here, Agent Keelan's affidavit establishes the requisite elements for enforcement of the summonses. First, Keelan stated that he was conducting an investigation to detennine Elmes' tax liabilities for the years 2002 through 2004, a purpose expressly authorized by Section 7602. See 26 U.S.C. § 7602(a) ("For the purpose of . . . determining the liability of any person for any internal revenue tax[.]"). Second, Keelan declared that he expected the records requested by the summonses to reveal information necessary to a determination of Elmes' tax liability by providing insight into Elmes' residency. Third, Keelan confirmed that, as of the date of the investigation, the IRS was not already in possession of the summoned information. Fourth, Keelan described how the summonses complied with the Code's procedures. Lastly, Keelan declared that no "Justice Department referral was in effect" with respect to Elmes. 26 U.S.C. § 7602(d).

The burden therefore shifts to Elmes either "to disprove one of the four elements of the government's prima facie showing or convince the court that enforcement of the summons would constitute an abuse of the court's process." La Mura, 765 F.2d at 979-80. Elmes does not dispute the Government's assertion that no referral to the Department of Justice has been made, nor does he argue that enforcement of the summonses would constitute an abuse of the court's process. Instead, he alleges that he is a bona fide resident of the Virgin Islands, and that, for reasons flowing from

this status, the Government has failed to satisfy three of the four Powell factors.[2] We disagree.

Elmes contends, first, that the Government's investigation was not conducted for a legitimate purpose. Specifically, Elmes argues that, because he is a bona fide resident of the Virgin Islands, the United States has no authority either to tax him or to investigate the possibility of taxing him. But a motion to enforce a summons does not require us to determine whether Elmes is or is not a resident of the Virgin Islands. The question we must address, rather, is whether an investigation into Elmes' residency --and, therefore, his taxability --is a legitimate purpose of the summons power. The plain language of Section 7602 indicates that it is. See 26 U.S.C. § 7602(a) . Moreover, even assuming that Elmes is a resident of the Virgin Islands, the IRS would still have the authority to investigate his tax liabilities because the IRS is allowed to tax residents of the Virgin Islands to the extent they have not paid their Virgin Islands taxes in full. See 26 U.S.C. § 932(c)(4); see also Mollison, 481 F.3d at 123. Accordingly, Elmes has not met his "heavy" burden of refuting the Government's prima facie showing that the summonses were issued for a "legitimate purpose."

Elmes next argues that the information sought was irrelevant to the Government's investigation. The Internal Revenue Code authorizes the Government to examine "any books, papers,

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[2] Elmes does not argue that the IRS was already in possession of the requested information when it issued the summonses - the third Powell factor.

records, or other data which may be relevant or material" to its inquiry. 26 U.S.C. § 7602(a)(1). "The government's burden of showing relevance in this context is slight. If the information sought by an IRS summons might throw light upon the correctness of the taxpayer's return, then it is deemed to be relevant." La Mura, 765 F.2d at 981 (internal quotation marks omitted).

We agree with the Government that the bank records and financial statements it seeks from American Express and Northern Trust Bank "might throw light upon" the question of Elmes' residency and, therefore, his tax liabilities. For example, Elmes' financial records may demonstrate that he conducts all, or a great majority of, his banking in Florida, rather than in the Virgin Islands. Similarly, his credit card statements may highlight the restaurants he frequents, the dry cleaners he uses, and a host of other transactions relevant to where he actually resides. Accordingly, Elmes has not met his "heavy" burden of refuting the Government's prima facie showing that the summonses were relevant to a determination of his residency.

Lastly, Elmes cites four cases --United States v. Stuart, 489 U.S. 353 (1989), Barquero v. United States, 18 F.3d 1311 (5th Cir. 1994), Mazurek v. United States, 271 F.3d 226 (5th Cir. 2001), and Lidas Inc. v. United States, 238 F.3d 1076 (9th Cir. 2001) --for the proposition that the IRS must comply with the procedures set forth in the Tax Implementation Agreement ("TIA") between the United States and the Virgin Islands before issuing a summons regarding a resident of the Virgin

Islands.[3] But these cases all involve summonses to American institutions issued by the IRS at the request of foreign treaty partners and pursuant to foreign investigations. It is certainly the case, as Elmes suggests, that when the taxing authorities of Canada, Mexico, France, or the Virgin Islands seek financial information from an American entity --as was the case in Stuart, Barquero, Mazurek and Lidas, respectively --they should submit their requests to the IRS, as provided in the various tax agreements and treaties between those countries and the United States. But where, as here, the IRS summons an American bank pursuant to its own investigation, the Government need only follow the Code's procedures. See Mollison, 481 F.3d at 125 (quoting Powell, 379 U.S. at 58) ("[A] literal reading of Powell requires compliance with only the Code's procedures, 'in particular, that the Secretary or his delegate, after investigation, has determined the further investigation to be necessary and has notified the taxpayer in writing to that effect.'").

Elmes concedes that he received proper notice, and the Government has said it needs the summoned information for the purpose of determining Elmes' tax liabilities. See Powell, 379 U.S. at 53-54 ("If, in order to determine the existence or nonexistence of fraud in the taxpayer's returns, information in the taxpayer's records is needed which is not already in the Commissioner's possession, we think the examination is not 'unnecessary' within the meaning of § 7605(b).").

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[3] The TIA was signed by the Secretary of the Treasury and a representative of the Virgin Islands on February 24, 1987.

Therefore, Elmes has failed to demonstrate that the summonses were procedurally improper.[4]
AFFIRMED.

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[4] Elmes argues, also, that Agent Keelan, who issued the summonses, was not the Secretary's authorized "delegate." But Internal Revenue Agents may issue summonses to third-party witnesses where "the issuing officer's manager, or any supervisory official above that level, has authorized the issuance of the summons in advance (evidenced by the supervisor's signature on the summons)[.]" IRS Delegation Order No.4 Rev. 22, 1997 WL 33479254 (1997). Here, both summonses bear the signature of Agent Keelan's Group Manager, Larry Harris.

ENTERED JANUARY 31, 2007

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

Case No. 06-60501-CIV-GRAHAM/O'SULLIVAN

TIMOTHY ELMES,
Petitioner,
vs.
UNITED STATES, through
Internal Revenue Service,
through Jim Keelan,
Revenue Agent
Respondent.
_____/

ORDER

THIS CAUSE came before the Court upon Petitioner's Objections to Report and Recommendation [D.E. 32-1] regarding Petitioner's Second Amended Petition to Quash Third Party Summons [D.E. 17], and the Government's Motion to Dismiss Second Amended Petition to Quash and Motion for Order Enforcing Internal Revenue Service Summonses [D.E. 19].

The Court has considered Plaintiff's Objection, the pertinent portions of the record, and has been fully advised in the premises.

In its Objections, Petitioner asserts that the Report and Recommendation issued by Magistrate

Judge John O'Sullivan should be rejected by this Court as it fails to properly take into account the procedures for issuing summons as set forth in the Tax Implementation Agreement ("TIA") between the United States of America and the Virgin Islands effective Feb. 24, 1987, 1989-1 C.B. 347. According to Petitioner, the TIA states that the IRS agent issuing the summons, in this case, Agent Keelan, just be the International IRS agent designated in writing [D.E. 32-1 at 2-3]. Petitioner's argument continues, that since Agent Keelan was not the agent designated in writing and was not delegated the authority to investigate the Petitioner, that Agent Keelan was without authority to obtain tax returns and tax return information about the Petitioner for returns filed in the United States Virgin Islands. The Petitioner asserts that the failure to follow the TIA procedure mandates that the summonses at issue be quashed.

First, the Court finds that Magistrate Judge O'Sullivan's well-reasoned Report of Recommendation of November 7, 2006 [D.E. 29] is not clearly erroneous or contrary to law. Further, the Court finds that Petitioner's Objections are not well taken as the Tax Implementation Agreement between the United States of America and the Virgin Islands specifically provides the following, "(n)otwithstanding the foregoing, the United States may exercise its rights under section 7602 et seq. of the Code to obtain information in the Virgin Islands without resorting to the procedures set forth in this Agreement." (emphasis added) See Tax Implementation Agreement, Art. 4, ¶ 4. Thus

Petitioner's Objections are without merit. Accordingly, it is

ORDERED AND ADJUDGED that Petitioner's Objections [D.E. 32-1] are overruled. In addition, it is further

ORDERED AND ADJUDGED that United States Magistrate Judge O'Sullivan's Report and Recommendation of November 7, 2006 [D.E. 29], is hereby **RATIFIED, APPROVED & AFFIRMED**. Accordingly, it is

ORDERED AND ADJUDGED that Petitioner's Second Amended Petition to Quash Third Party Summons [D.E. 17] is **DENIED**. It is further

ORDERED AND ADJUDGED that the Government's Motion to Dismiss Petitioner's Second Amended Petition to Quash and Motion for Order Enforcing Internal Revenue Service Summonses [D.E. 19] is **GRANTED in Part** and **DENIED in Part**. To the extent that the Government seeks to Dismiss Petitioner's Second Amended Petition to Quash Third Party Summons, the Motion is DENIED as Moot. To the extent that the Motion seeks an Order Enforcing Internal Revenue Summonses, the Motion is GRANTED.

DONE AND ORDERED in Chambers at Miami, Florida, this 26th day of January, 2007.

s/Honorable Donald L. Graham
DONALD L. GRAHAM
UNITED STATES DISTRICT JUDGE

cc: U.S. Magistrate Judge O'Sullivan
Counsel of Record

ENTERED NOVEMBER 11, 2007

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 06-60501-CIV-GRAHAM/O'SULLIVAN

TIMOTHY ELMES,
Petitioner,

v.

UNITED STATES OF AMERICA
Respondent.
_____/

REPORT AND RECOMMENDATION

THIS MATTER is before the Court on the petitioner's Second Amended Petition to Quash Third Party Summons (DE# 17, 8/28/06) and the government's Motion to Dismiss Second Amended Petition to Quash and Motion for Order Enforcing Internal Revenue Service Summonses (DE# 19, 9/12/06) pursuant to orders of reference entered by the Honorable Donald L. Graham, United States District Judge. (DE# 4, 6/12/06; DE# 24, 9/21/06). Having reviewed the filings and having heard from the parties at a hearing conducted Wednesday, October 25, 2006, the undersigned respectfully recommends that the Petitioner's Second Amended Petition to Quash Third Party Summons (DE# 17, 8/28/06) be **DENIED**, the government's Motion to Dismiss Second Amended Petition to Quash (DE# 19, 9/12/06) be **DENIED as moot** and the government's Motion for Order Enforcing Internal

Revenue Service Summonses (DE# 19, 9/12/06) be **GRANTED** as more fully described below.

BACKGROUND

As part of an investigation into the petitioner's tax liability for the taxable years 2002 through 2004, IRS Revenue Agent Jim Keelan issued summonses on March 22, 2006 and June 29, 2006 to American Express, Subpoena Compliance Group and Northern Trust Bank, Records Custodian, respectively.[1] The summonses requested information such as bank account statements, credit card statements, correspondence, and billing or address information. Agent Keelan sought this information to determine whether the petitioner was a bonafide resident of the Virgin Islands for the tax years in question. See Declaration of Jim Keelan (DE# 3 at 5, 5/30/06). The petitioner's residency "is Important because, if he was not a bonafide resident of the [Virgin Islands] for tax purposes during the years at issue, he was required to file income tax returns in the United States and report all of his income on a U.S. tax return." Id. at 4. On April 10, 2006, the petitioner filed a petition to quash the summons issued to American Express, Subpoena ompliance Group pursuant to 26 U.S.C. § 7609(h). (DE# 1, 4/10/06). Subsequently, the petitioner sought and was granted leave to amend his petition to include the summons issued on June 29, 2006 to Northern Trust Bank, Records Custodian. (DE# 9, 7/19/06;

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[1] American Express, Subpoena Compliance Group and Northern Trust Bank, Records Custodian are third party record keepers pursuant to 26 U.S.C. § 7603(b)(2).

DE# 10, 7/31/06).[2] On August 15, 2006, the undersigned denied as moot the Petition and Amended Petition to Quash and granted the petitioner leave to file a Second Amended Petition to Quash. (DE# 15, 8/15/06). The government filed a Motion to Dismiss Second Amended Petition to Quash and Motion for Order Enforcing Internal Revenue Service Summonses and the supporting declarations of Revenue Agents Jim Keelan, Linda Brice and Tim Johnson. (DE# 19-22, 9/12/06, 9/13/06).

ANALYSIS

The petitioner argues that under the Tax Implementation Agreement between the United States and the U.S. Virgin Islands (Virgin Islands) the subject summonses must be quashed because (1) they were issued without proper authority and (2) they seek information inconsistent with established procedures. See Second Amended Petition to Quash Third Party Summons. (DE# 17 at 1, 8/28/06). The government seeks to dismiss the Second Amended Petition to Quash pursuant to Fed. R. Civ. P. 12(b)(6) and enforce the subject summonses. See Motion to Dismiss Second Amended Petition to

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[2] In response to the Petition to Quash and Amended Petition to Quash, the government filed its Motion to Dismiss Petition to Quash and Motion for Order Enforcing Internal Revenue Service Summons on May 30, 2006 and Motion to Dismiss Amended Petition to Quash and Motion for Order Enforcing Internal Revenue Service Summonses on August 8, 2006. (DE# 2, 5/30/06; DE# 13, 8/8/06). The government's motions were supported by the declarations of Revenue Agent Jim Keelan. (DE# 3, 5/30/06; DE# 14, 8/8/06).

Quash and Motion for Order Enforcing Internal Revenue Service Summonses. (DE# 19, 9/12/06).

A. SECOND AMENDED PETITION TO QUASH THIRD PARTY SUMMONS

Pursuant to 26 U.S.C. § 7602, the IRS has broad power to issue administrative summonses to examine any books, papers, records or other data that may be relevant or material to an inquiry concerning compliance with the internal revenue laws. La Mura v. United States, 765 F.2d 974, 979 (11th Cir.1985).

In order to establish a prima facie case for nforcement, the government must show: (1) that the investigation will be conducted pursuant to a legitimate purpose; (2) that the inquiry may be relevant to that purpose; (3) that the information sought is not already within the IRS' possession and (4) that the administrative steps required by the Internal Revenue Code have been followed. United States v. Powell, 379 U.S. 48, 57-58 (1964); see also, e.g., United States v. Leventhal, 961 F.2d 936, 939 (11th Cir.1992).[3]

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[3] The government, here must establish the Powell elements because it seeks enforcement of the subject summonses. Ordinarily, where the government seeks to dismiss a petition to quash but does not seek enforcement of a summons, "the burden shifts immediately to the petitioner to establish a valid defense to the summons." Knauss v. United States, 28 F.Supp. 2d 1252, 1254 (S.D. Fla. 1998) citing Cosme v. Internal Revenue Service, 708 F.Supp 45, 48 (E.D. N.Y. 1989).

"The [government] can satisfy this burden merely by presenting the sworn affidavit of the agent who issued the summons attesting to these facts.... Thereafter, the burden shifts to the party contesting the summons to disprove one of the four elements of the government's prima facie showing or convince the court that enforcement of the summons would constitute an abuse of the court's process." La Mura, 765 F.2d at 979-80; see also, e.g., Leventhal, 961 F.2d at 939-40. "The burden on the contesting party is a heavy one, requiring allegation of specific facts and introduction of evidence." Leventhal, 961 F.2d at 940 (internal citations and quotations omitted). "The net result is that some minimal inquiry into matters underlying an IRS summons is permitted, but that inquiry will be limited solely to the four Powell elements, and may not be used as a forum to challenge the validity of an assessment." Panton, 780 F.Supp. 797, 801 (S.D. Fla. 1991).

1. Investigation Conducted Pursuant to a Legitimate Purpose

Section 7602 authorizes the IRS to summon certain persons and data "[f]or the purpose of ... determining the liability of any person for any internal revenue tax." 26 U.S.C. § 7602(a). Agent Keelan's declaration states that he issued the subject summonses to determine the petitioner's federal income tax liabilities for the years at issue and whether the petitioner was a bonafide resident of the Virgin Islands. See Declaration of Jim Keelan (DE# 3 at 5, 5/30/06). Agent Keelan further states that the

IRS has not made a criminal referral to the epartment of Justice regarding the petitioner. Id. at 7.

The petitioner argues that the government cannot satisfy this first Powell element because Agent Keelan does not have authority under the Tax Implementation Agreement between the United States and the U.S. Virgin Islands (hereinafter "TIA") to investigate the petitioner and thus could not have issued the subject summonses for a proper purpose.[4] "[T]he TIA precludes [Agent] Keelan from doing such an investigation and specifically prevents him from being the 'assigned agent.'" See Second Amended Petition to Quash Third Party Summons (DE# 17 at 5, 8/28/06). According to the petitioner, only the IRS International Division can investigate who is a bonafide Virgin Islands resident. The petitioner relies on Article 7 of the TIA. Article 7 states that:

> [t]he Contracting Governments agree that when they have knowledge that a taxpayer changed residence from one taxing jurisdiction to the other and seeks to change methods of accounting (or to make an intial election), no such change or election shall be permitted until the competent authorities have consulted and determined that such change or election will not lead to the evasion or avoidance of taxes imposed by either of the contracting governments.

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[4] The Tax Implementation Agreement 4 was signed on February 24, 1987, and took effect on that date. Tax Implementation Agreement, art. 8.

Tax Implementation Agreement, art. 7, § 1. Article 3, § 1(b)(1) defines "competent authority" as "the Secretary of the Treasury or his delegate." The petitioner's reliance on article 7, § 1 is misplaced. Article 7 concerns a change in accounting methods and does not address who has the authority to investigate a change in residency.

Moreover, the petitioner's argument is not supported by case law. In Vento v. United States, Nos. 3:05-CV-0590, 3:05-CV-0591, 3:05-CV-0592, 2006 WL 2787079, 2 (D. Nev. Sept. 26, 2006), the court rejected the [p]etitioner's contention that because they [we]re bonafide residents of the Virgin Islands, the IRS [wa]s without authority to investigate them" noting that "the government has never given up its authority over Virgin Islands residents for U.S. income tax liability." Thus, despite the petitioner's claims, the TIA does not preclude the IRS from issuing the subject summonses.

The government has established a proper purpose for issuing the subject summonses under Powell. "Where as here the issue is the residency of the taxpayer, the peculiar nature of the mirror tax system suggests the IRS' present goals in issuing the summonses are in line with [the legitimate goals of a summons]." In re Various Orders to Show Cause, Nos. 87/46, 87/69, 87/83, 87/108, 87/110, 87/119, 87/121, 87/145 and 87/147, 1988 WL 62872, 2 (D. V.I. Jan. 28, 1988).

2. Inquiry May Be Relevant to the Purpose

The government has also shown that the information sought in the summonses may be relevant to determining the petitioner's tax liability and whether he is a bonafide resident of the Virgin Islands. "The standard for relevance is whether the information sought might have thrown light upon the matter being investigated." Benistar 419 Plan Services, Inc. v. United States, 44 Fed. Appx. 902, 903 (2d Cir. 2005) (internal citation and quotations omitted). Here, the subject summonses seek information such as correspondence, including client billing/address information, individual charge invoices and monthly or periodic bank account statements. The information sought by the subject summonses may be relevant to determining the petitioner's residency for tax purposes, which directly impacts his tax liability. Accordingly, the government has satisfied this element.

3. Information Sought Is Not Already in the IRS' Possession

In support of the third element, Agent Keelan has declared that the information sought by the subject summonses were not in the IRS' possession. See Declaration of Jim Keelan (DE# 22 at 4, 9/13/06). The petitioner claims that the documents sought by the subject summonses are already in the possession of the U.S. Virgin Islands IRS or the International Division of the IRS but has proffered no evidence that either division has the specific documents requested by the subject summonses.

Thus, the petitioner has failed to disprove Agent Keelan's declaration.

The petitioner also argues that "realistically, and under the TIA all the information that is needed [to determine the petitioner's residency] is already in the possession of the International Division or... the U.S. Virgin Islands." See Second Amended Petition to Quash Third Party Summons (DE# 17 at 7-8, 8/28/06). However, Revenue Agents Jim Keelan, Linda Brice and Tim Johnson[5] have filed declarations stating that the documents provided to the IRS, thus far, are insufficient to determine the petitioner's residency. See Declarations of Jim Keelan, Linda Brice and Tim Johnson (DE# 20-22, 9/12/06, 9/13/06). Moreover, the Court should be hesitant to limit the type of information that the IRS may use to determine the petitioner's residency. As one court observed:

> Residency... will likely be deduced from multiple sources involving quite different documents, records and testimony. To place a limitation upon the IRS ... would, over the long and the short term, require this Court to determine at this stage which documents, records and testimony go to the inhabitancy of [the taxpayer]. This is not our role in a tax summons enforcement hearing.

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[5] Agents Brice and Johnson are assigned to the International Division of the IRS.(DE# 20 at 3, 9/12/06; DE# 21 at 3, 9/13/06).

In re Various Orders to Show Cause,1988 WL 62872, 2 (D. V.I. Jan. 28, 1988). Thus, the government has satisfied this element of the Powell inquiry.

4. The Administrative Steps Required by the Internal Revenue Code Were Followed

Lastly, the petitioner argues that the subject summonses were issued in direct violation of the TIA. See Second Amended Petition to Quash Third Party Summons (DE# 17 at 4, 8/28/06). The petitioner claims that "this case is not governed by the procedural steps of the [IRS] Code but by .... [the] TIA." Id. at 3. Thus, the petitioner reasons that the government must comply with the TIA's procedural requirements in order to satisfy the fourth element of Powell. According to the petitioner, the TIA did not authorize Agent Keelan to issue the subject summonses. See Second Amended Petition to Quash Third Party Summons (DE# 17 at 5, 8/28/06). Under the petitioner's interpretation of the TIA only the IRS International Division had the authority to issue the subject summonses.

The petitioner's claim that the subject summonses were invalid because they did not comply with the procedural requirements of the TIA fails. A stated purpose of the TIA is "to provide mutual assistance in tax matters, including the exchange of information." Tax Implementation Agreement, art.1. "The TIA by its express terms allows the IRS to investigate Virgin Islands residents without following any otherwise prescribed procedures." Vento, 2006 WL 2787079 at 2. See also

Mollison v. United States, No. 05 Civ. 9315 - 18(JSR), 05 Civ. 9320-24(JSR), 2006 WL 662066 (S.D.N.Y. Mar. 15, 2006) (rejecting the "argument that enforcement of [a] summons [wa]s barred by the IRS' alleged failure to follow the procedures required by the Tax Implementation Agreement.").

The proper administrative steps for notice to the taxpayer of a third party summons are set forth in 26 U.S.C. §§ 7603(b)(1) and 7609(a)(1). Based on the declaration of Agent Keelan, the government has satisfied this Powell element. See Declaration of Jim Keelan (DE# 14 at 6-7, 8/8/06).

In sum, the government has established a prima facie case for enforcement of the subject summonses under Powell. The petitioner has failed to refute the government's prima facie case or shown that the enforcement of the subject summonses would constitute an abuse of the court's process. Accordingly, it is respectfully recommended that the Petitioner's Second Amended Petition to Quash Third Party Summons (DE# 17, 8/28/06) be **DENIED**.

B. MOTION TO DISMISS SECOND AMENDED PETITION TO QUASH THIRD PARTY SUMMONS

The government moves to dismiss the Second Amended Petition to Quash for failure to state a claim upon which relief can be granted pursuant to Fed. R. Civ. P. 12(b)(6). (DE# 19, 9/12/06). Because the undesigned agrees with the government that its summonses should be enforced under Powell, it is

respectfully recommended that the government's Motion to Dismiss Second Amended Petition to Quash (DE# 19, 9/12/06) be **DENIED as moot**.

C. MOTION FOR ORDER ENFORCING INTERNAL REVENUE SERVICE SUMMONSES

For the reasons stated above, the undersigned specifically finds that the government has demonstrated that the investigation of the petitioner is being conducted pursuant to a legitimate purpose, the inquiry may be relevant to that purpose, the information sought is not already within the possession of the IRS and the required administrative steps have been followed. Because the government has met its burden under Powell and the petitioner has failed to refute the government's prima facie case or shown that the enforcement of the subject summonses would constitute an abuse of the court's process, it is respectfully recommended that the government's Motion for Order Enforcing Internal Revenue Service Summonses (DE# 19, 9/12/06) be **GRANTED**.

RECOMMENDATION

It is recommended that the Petitioner's Second Amended Petition to Quash Third Party Summons (DE# 17, 8/28/06) be **DENIED**. It is further recommended that the Government's Motion to Dismiss Second Amended Petition to Quash be **DENIED as moot** and Motion for Order Enforcing Internal Revenue Service Summonses (DE# 19,

9/12/06) be **GRANTED**. Pursuant to 28 U.S.C. §6 36(b)(1)(B) and (C), the parties may serve and file written objections to this Report and Recommendation with the Honorable Donald L. Graham, United States District Judge, within ten (10) days of receipt of a copy of this Report and Recommendation. See Nettles v. Wainwright, 677 F.2d 404 (5th Cir. 1982).

RESPECTFULLY SUBMITTED in Miami, Florida, this **7th** day of November, 2006.

/s/ John J. Sullivan
JOHN J. O'SULLIVAN
UNITED STATES MAGISTRATE JUDGE

Copies provided to:
U.S. District Judge Graham
All counsel of record

ENTERED MAY 1, 2008

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 07-11029-HH

TIMOTHY J. ELMES,

Plaintiff-Appellant

versus

UNITED STATES OF AMERICA,
through Internal Revenue Service,
through Kim Keelan, Revenue Agent,

Defendant-Appellee.

On Appeal from the United States District Court for the Southern District of Florida

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Before: TJOFLAT, MARCUS and WILSON, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:
/s/ Stanley Marcus
UNITED STATES CIRCUIT JUDGE

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
MAY 01, 2008
THOMAS K. KAHN
CLERK

ORD-42
(6/95)

TAX IMPLEMENTATION AGREEMENT BETWEEN THE UNITED STATES OF AMERICA AND THE VIRGIN ISLANDS

The Government of the United States of America and the Government of the Virgin Islands desiring to conclude an Agreement (hereinafter" referred to as the "Agreement") for the exchange of information and mutual assistance with respect to taxes in order to prevent the evasion or avoidance of United States or Virgin Islands taxes have agreed as follows:

Article 1
SCOPE OF AGREEMENT

This Agreement is intended to provide for mutual assistance in tax matters, including exchanges of information, for purposes of administering the tax laws of the respective Governments and especially to prevent avoidance or evasion of the Governments' respective fiscal laws. This Agreement is the implementing agreement described in section 1277 of the Tax Reform Act of 1986, Pub. L. No. 99-514. The provisions of this Agreement are subject to provisions of the statutes, regulations, and published procedures of the Contracting Governments.

Article 2
TAXES COVERED

1. This Agreement shall apply to the following taxes imposed by or on behalf of a Contracting Government:

a) in the case of the United States of America, all taxes imposed by the Code, and

b) in the case of the Virgin Islands, all taxes imposed by the Code as it applies in the Virgin Islands and all local income taxes imposed by the Virgin Islands as authorized by the Tax Reform act of 1986.

2. This Agreement shall apply also to any individual or substantially similar taxes imposed after the date of signature of the agreement in addition to or in place of the existing taxes. The competent authority of each Government shall notify the other of significant changes in laws which may affect the obligations of that Government pursuant to this Agreement.

3. This agreement shall not apply to the extent that an action or proceeding concerning taxes covered by this Agreement is barred by the applicant Government's statute of limitations.

Article 3
DEFINITIONS

1. This Agreement, unless otherwise defined:

a) The term "Code" shall mean the Internal revenue code of 1986, as amended, and any predecessor or successor statutes,

b) The term "competent authority" means:

(i) in the case of the United States of America, the secretary of the Treasury or his delegate, and

(ii) in the case of the Virgin Islands, the Director, Virgin Islands Bureau of Internal Revenue or his delegate.

c) The term "Contracting Government" means the United States or the Virgin Islands as the context requires.

d) The term "non-Virgin Islands source income" means income for which the source (under source rules promulgated by the U.S. Internal Revenue Service) is not the Virgin Islands.

e) The term "person" includes an individual and a partnership, corporation, company, trust, estate, association or other legal entity.

f) The term "tax" means any tax to which the Agreement applies.

g) The term "taxpayer" means:

(i) in the case of the United states, any person subject to the provisions of the Code, and

(ii) in the case of the Virgin Islands, any person subject to the provisions of the Code as it applies in the Virgin Islands or any local income tax laws imposed by the Virgin Islands.

h) For purposes of determining the geographical area within which jurisdiction to compel production of information under this Agreement may be exercised, the term "United States" means the United States of America, including Puerto Rico, Guam, American Samoa, the Commonwealth of the Northern Mariana Islands, and any other United States possession or territory and the territorial waters thereof, but not including the Virgin Islands. Such jurisdiction may be exercised if the information or, the custodian of the information is located within the United States.

i) For purposes of determining the geographical area within which jurisdiction to compel production of information under this Agreement may be exercised, the term "Virgin Islands" means the territorial domain, lands and waters acquired by the United States through cession of the Danish West Indian Islands by the Convention between the

United States of America and His Majesty the King of Denmark entered into August 4, 1916, and ratified by the Senate on September 7, 1916 (39 Stat. 1706). Such jurisdiction may be exercised if the information or the custodian of the information is located within the Virgin Islands.

2. Any term not defined in this Agreement, unless the context otherwise requires or the competent authorities agree to a common meaning pursuant to the provisions of Article 5, shall have the meaning which it has under the laws of the Contracting Governments relating to the taxes which are the subject of this Agreement.

Article 4
EXCHANGE OF INFORMATION

1. The competent authorities of the Contracting Governments shall exchange information to administer and enforce the domestic laws of the Contracting Governments concerning taxes covered by this Agreement. Information shall be exchanged to fulfill the purposes of this Agreement without regard to whether the information relates to, or is held by, a taxpayer of a Contracting Government. Procedures for exchange of information are set forth in Appendix A, Limitations on Disclosure of Tax Information, which is incorporated by reference and made a part of this Agreement.

2. The competent authorities of the Contracting Governments shall automatically transmit information to each other for the purposes referred to in paragraph 1. The competent authorities shall determine the items of information to be exchanged pursuant to this paragraph and the procedures to be used to exchange such items of information.

a) It is intended that the United states shall routinely supply to the Virgin Islands the following information, to the extent available and subject to the tolerances and criteria to be greed upon by the competent authorities:

(i) copies of reports of individual, partnership, corporate, and employment audit changes that disclose information relevant to the Virgin Islands;

(ii) copies of Forms 5335 (Income Subject to Withholding under Chapter 3, Internal Revenue Code as reported on Form 1042S, and any successor forms) that disclose information relevant to the Virgin Islands;

(iii) copies of Schedule K-l of Form 1065 (U.S. Partnership Return of Income) and audit results, when the partnership return is examined and it appears the

examination will affect returns of Virgin Islands taxpayers;

(iv) copies of responses to Forms 4901, 4902, and 4903, Requests for Information About Tax Forms, where such reply indicates that the taxpayer has filed a return with the Virgin Islands;

(v) copies of Forms 1099 and all other information returns where the recipient of income is a Virgin Islands resident or lists a Virgin Islands address or the income is from Virgin Islands sources;

(vi) copies of the W-2 combined wage reporting tape summarizing Forms W-2VI (U.S. Virgin Islands Wage and Tax statement) and Forms W-3SS (Transmittal of Wage and Tax Statements) filed with the Social Security Administration by employers in the Virgin Islands, which tape is provided annually to the Internal Revenue Service by the Social Security Administration; and

(vii) copies of Forms 8279 (Election to be Treated as a FSC or as a Small FSC) that indicate creation

or organization of any Foreign Sales Corporation (as defined in Section 922 of the Code) in the Virgin Islands.

b) It is intended that the Virgin Islands shall routinely supply to the United States the following information, to the extent available and subject to the tolerances and criteria to be agreed upon by the competent authorities:

(i) copies of reports of individual, partnership, corporate, and employment audit changes that disclose information relevant to the United States;

(ii) information about the ownership interests of all corporations subject to Virgin Islands tax with non-Virgin Islands source income that receive a rebate, subsidy or reduction of Virgin Islands taxes;

(iii) information about any taxpayer subject to Virgin Islands tax with non-Virgin Islands source income who files an income tax return with the Virgin Islands claiming for the first time to be a Virgin Islands resident;

(iv) all corporate information about ownership interest in any

Foreign Sales Corporation (as defined in section 922 of the Code) established in the Virgin Islands;

(v) such information about corporations electing application of section 936 of the Code as may be agreed upon by the competent authorities; and

(vi) information about any rebates, subsidies or reductions of tax provided by the Virgin Islands for income derived by a Virgin Islands taxpayer from other United States possessions and territories.

c) The competent authorities of the Contracting Governments may agree to expand or limit the information to be routinely exchanged.

3. The competent authority of a Contracting Government shall spontaneously transmit to the competent authority of the other Government information which has come to the attention of the first-mentioned Government and which is likely to be relevant to, and bear significantly on, administration and enforcement of the domestic laws concerning taxes of the second-mentioned Government. The competent authorities shall determine the information to be exchanged pursuant to this paragraph and take such measures and

implement such procedures as are necessary to ensure that the information is forwarded to the competent authority of the other Government.

4. The competent authority of the requested Government shall endeavor to provide information upon request by the competent authority of the applicant Government for the administration and enforcement of the domestic laws of the Contracting Governments concerning taxes. If the information available in the tax files of the requested Government is not sufficient to enable compliance with the request, that Government shall take the necessary measures to provide the applicant Government with the information requested. Notwithstanding the foregoing, the United States may exercise its rights under section 7602 et seq. of the Code to obtain information in the Virgin Islands without resorting to the procedures set forth in this Agreement. However, in the event the United States so exercises its rights within the Virgin Islands it shall notify the competent authority of the Virgin Islands prior to taking action or as soon as practicable, unless the competent authorities agree to limit notification with respect to certain classes of cases.

5. The provisions of the preceding paragraphs shall not be construed so as to impose on a Contracting Government the obligation:

a) to supply particular items of information which are not obtainable under the laws of that Government or of the other Contracting Government;

b) to supply information which would disclose any trade, business, industrial, commercial or professional secret or trade process;

c) to supply information, the disclosure of which would be contrary to public policy;

d) or to disclose information if such disclosure would identify a confidential informant or seriously impair a civil or criminal tax investigation.

6. Any information received by a Contracting Government shall be subject to Appendix A, Limitations on Disclosure of Tax Information.

Article 5
MUTUAL AGREEMENT PROCEDURE AND COSTS

1. The competent authorities of the Contracting Governments shall implement a program to carry out the purposes of this Agreement. In particular, the competent authorities of the Contracting Governments may amend Appendix A as they deem necessary within the limitations of this Agreement and the Code.

2. The competent authorities of the contracting Governments shall endeavor to resolve by mutual agreement any difficulties or doubts arising as to the interpretation or application of this Agreement and may communicate directly for this purpose. In

particular, the competent authorities may agree to the common meaning of a term and may determine when costs are extraordinary for purposes of this Article.

3. Unless the competent authorities of the Contracting Governments otherwise agree, ordinary costs incurred in providing assistance shall be borne by the requested Government and extraordinary costs incurred in providing assistance shall be borne by the applicant Government. The competent authorities of the Contracting Governments may agree not to charge each other for the costs of reproduction of information routinely exchanged.

Article 6
MUTUAL AGREEMENT PROCEDURE ON POTENTIAL DOUBLE TAXATION

1. When by reason of inconsistent positions taken by the Contracting Governments, a taxpayer is or would be subject to inconsistent tax treatment by the two jurisdictions, the competent authorities of the Contracting Governments shall endeavor to agree upon the facts and circumstances necessary to achieve consistent application of the tax laws of the respective Governments. In particular, but not by way of limitation, the competent authorities of the Contracting Governments may consult together to endeavor to agree:

a) To the same allocation of income under section 482 of the Code;

b) To the same determination of residency of a particular taxpayer; or

c) To the same determination of the source of particular items of income.

Article 7
OTHER APPLICATIONS OF AGREEMENT

1. The Contracting Governments agree that when they have knowledge that a taxpayer has changed residence from one taxing jurisdiction to the other and seeks to change methods of accounting (or to make an initial election), no such change or election shall be permitted until the competent authorities have consulted and determined that such change or election will not lead to the evasion or avoidance of taxes: imposed by either of the Contracting Governments. This paragraph includes initial adoption of an accounting method or an election inconsistent with a method or election previously utilized in the other jurisdiction by the taxpayer.

2. The Contracting Governments agree that a Virgin Islands corporation owned or controlled directly or indirectly by a person whose beneficial ownership is undisclosed (such as through bearer shares) shall be treated as owned or controlled to that extent by a U.S. person for purposes of the respective Governments' tax laws.

3. The Contracting Governments agree that for purposes of determining whether a person qualifies as a bona fide resident of the Virgin Islands under

section 932 of the Code the definition to be used shall be the definition contained in the then applicable regulations promulgated by the United States.

4. The Contracting Governments agree that the United States may use its regulatory authority over sourcing rules to determine that certain income (such as income from the sale of property) earned by certain former residents of the United States who become residents of the Virgin Islands is U.S.-source income for purposes of section 934(b) of the Code and therefore tax on such income may not be reduced or rebated by the Virgin Islands.

5. Any taxpayer information disclosed to the United States shall become "taxpayer return information" as defined by section 6103(b)(3) of the Code and may be redisclosed only in accordance with provisions of the Code or an applicable treaty.

6. Subject to the restrictions and other provisions of this Agreement and the availability of enforcement resources, the competent authorities will develop a cooperative return selection and examination program with the objective of avoiding unnecessary duplication of examination coverage.

7. Subject to the restrictions and other provisions of this Agreement, the Contracting Governments will develop a simultaneous examination program for both civil and criminal investigations.

8. To the extent permitted by law and subject to the availability of enforcement resources, the United states will assist in collecting taxes owed to the Virgin Islands by Virgin Islands taxpayers present in the United States. The competent authorities will discuss appropriate procedures for facilitating such collection. Any taxes collected shall be remitted to the Virgin Islands, less the reasonable expenses incurred in collection.

9. In addition to the exchange of tax and other information, the competent authorities will, to the extent feasible, extend to each other assistance in other tax administration matters. This may include such activities as taxpayer assistance, stocking tax forms for the public, training of personnel, preparing special statistical studies and compilations of data, development and improvement of tax administration systems and procedures, as well as such other activities as may improve tax administration:

Article 8
ENTRY INTO FORCE

This Agreement shall enter into force upon signature by the duly authorized representatives of the Contracting Governments.

Article 9
AMENDMENT AND TERMINATION

1. This Agreement may be modified or amended by mutual consent of the Contracting Governments.

2. This agreement shall remain in force until terminated by one of the Contracting Governments. Either Contracting Government may terminate the Agreement at any time after the Agreement enters into force provided that at least 6 months prior notice of termination has been given.

3. Any unauthorized use or disclosure of Federal returns or Federal return information as defined by section 6103(b)(1) and (2) of the Code furnished pursuant to this Agreement or inadequate procedures for safeguarding the confidentiality of such returns and return information, constitutes grounds for immediate termination of this Agreement and the exchange of information thereunder, subject to the rights of administrative appeal as provided by regulations prescribed by section 6103(p)(7) of the Code.

DONE at Washington, D.C., in duplicate, this 24 day of February, 1987.

FOR THE GOVERNMENT OF THE
UNITED STATES OF AMERICA

/S/ Signature of Assistant Secretary
Assistant Secretary (Tax Policy)
Department of Treasury

FOR THE GOVERNMENT OF THE
VIRGIN ISLANDS OF THE UNITED STATES

/S/ Signature of Governor
Governor of the Virgin Islands

/S/ Signature of Director BIR
Director, Bureau of Internal
Revenue of the Virgin Islands

APPENDIX A
LIMITATIONS ON DISCLOSURE OF TAX INFORMATION

Section 1. Definitions

For purposes of this appendix, the following definitions apply:

1.1 Bureau. The term "Bureau" means the V.I. Bureau of Internal Revenue ,and any successor agency.

1.2 IRS. The term "IRS" means the Internal Revenue Service, U.S. Department of Treasury.

1.3 Possession Audit Agency. The term "Possession Audit Agency" means the agency, body or commission which is charged under the laws of the Virgin Islands with the responsibility of auditing Possession revenues and programs.

1.4 Possession. The term "Possession" means the Virgin Islands of the United States.

1.5 Bureau Representative. The term "Bureau Representative" means a Bureau officer or employee designated in writing by the head of the Bureau, to the Assistant Commissioner (International) at Washington, D.C. and the Service Center Director at Philadelphia, PA, as an individual who is to inspect or receive Federal returns or Federal return information on behalf of the Bureau as provided by section 6103(d) of the Code, but only so long as the duties and employment of such officer or employee

require access to Federal returns and Federal return information for purposes of Possession tax administration.

1.6 IRS Representative. The term "IRS Representative" means an officer or employee of the IRS who has been designated in writing to the head of the Bureau by the Assistant Commissioner (International) at Washington, D.C., or the Service Center Director at Philadelphia, PA, as an individual who is to inspect or receive Possession returns or Possession return information on behalf of the IRS, but only so long as the duties and employment of such officer or employee require access to Possession returns and return information for the purpose of Federal tax administration.

1.7 Federal Return. The term "Federal Return" is defined in the same manner as provided in section 6103(b)(1) of the Code.

1.8 Federal Return Information. The term "Federal Return Information" is defined in the same manner as provided in section 6103(b)(2) of the Code. However, "Federal Return Information" does not include information in the hands of the Possession which it obtained wholly from sources independent from the IRS.

1.9 Possession Return. The term "Possession Return" is defined in the same manner as provided in section 6103(b)(1) of the Code as it applies in the Virgin Islands.

1.10 Possession Return Information. The term "Possession Return Information" means a taxpayer's identity, the nature, source, or amount of his/her income, payments, receipts, deductions, exemptions, credits, assets, liabilities, net worth, tax liability, tax withheld, deficiencies, overassessments, or tax payments, whether the taxpayer's Possession return was, is being, or will be examined or subject to other investigation or processing, or any other data received by, recorded by, prepared by, furnished to, or collected by the Bureau with respect to a Possession return or with respect to determination of the existence, or possible existence, of liability (or the amount thereof) of any person under the internal revenue laws, or related statutes, of the Possession, for any tax, penalty, interest, fine, forfeiture, or other imposition, or offense.

1.11 Inspection. The term "Inspection" means any examination of a return or return information.

1.12 Disclosure. The term "Disclosure" means the making known to any person in any manner whatever a return or return information.

1.13 Possession Tax Administration. The term "Possession Tax Administration"

(a) means--

(i) the administration, management, conduct, direction, and supervision of the execution and application of the revenue laws, or related statutes of the Possession; and

(ii) the development and formulation of Possession tax policy relating to existing or proposed internal revenue laws, or related statutes, of the Possession; and

(b) includes assessment, collection, enforcement, litigation, and statistical-gathering functions under such laws or statutes.

1.14 Code. The term "Code" means the Internal Revenue Code of 1986, as amended, and any predecessor or successor statutes.

SECTION 2. Disclosure of Federal Returns and Federal Return Information

2.1 Pursuant to the laws of the Possession, the Bureau is charged with the responsibility for the administration of Possession taxes imposed on income, inheritance, gifts, gross receipts from the conduct of a trade or business, real property and excise taxes on imports used in the conduct of a trade or business. Federal returns, and Federal return information (whether originals, paper copy, photocopy, microfilm, magnetic media, or any other form) received from the IRS will be used for the purpose of, and only to the extent necessary in, Possession tax administration.

2.2 This Agreement and Appendix constitute the requisite authorization pursuant to section 6103(d)(1) of the Code for the IRS to disclose to, and permit inspection by; a Bureau Representative of Federal returns and Federal return information relating to

taxes imposed by chapters one, two, six, eleven, twelve, twenty-one, twenty-three, twenty-four, thirty-one, thirty-two, forty-four, forty-five, fifty-one, fifty-two, and subchapter D of chapter thirty-six of the Code.

2.3 Upon the occurrence of any change in employment, duties, or other relevant matters affecting a Bureau Representative's right to access to Federal returns and Federal return information or status as a Bureau Representative, the head of the Bureau shall promptly advise in writing the Assistant Commissioner (International) at Washington, D.C. and the Service Center Director at Philadelphia, PA, that such individual is no longer a Bureau Representative.

2.4 A Bureau Representative to whom a Federal return or Federal return information has been disclosed, may thereafter disclose such return or return information:

(a) to another employee of the Bureau for the purpose of and only to the extent necessary in the administration of the Possession tax laws for which the Bureau is responsible;

(b) to a person described in section 6103(n) of the Code or to any officer or employee of such person, solely for the purpose of Possession tax administration and in a manner consistent with applicable regulations, published rules or procedures, or written communications;

(c) to a legal representative of the Bureau personally and directly engaged in, and solely for use in, preparation for a civil or criminal proceeding (or investigation which may result in a proceeding) before a Possession administration body, grand jury, or court in a matter involving Possession tax administration, if the returns and return information satisfy one or more of the "criteria established in section 6103(h)(4)(A), (B) or (C); and

(d) to an officer or employee of the Possession audit agency for the purpose of and only to the extent necessary in making an audit of the Bureau.

2.5 A Federal return or Federal return information may be disclosed in a judicial or administrative proceeding pertaining to Possession tax administration, but only if the criteria established in section 6103(h)(4)(A), (B) or (C) of the Code are met.

2.6 Notwithstanding any other provision of this section, the IRS will not disclose a Federal return or Federal return information under this section if such disclosure would identify a confidential informant or seriously impair a Federal civil or criminal tax investigation. The Bureau agrees that neither it nor its legal representatives will make any further use or disclosure of a Federal return or Federal return information disclosed to a Bureau Representative by the IRS if the IRS notifies the head of the Bureau in writing that such further use or disclosure would

identify a confidential informant or seriously impair a Federal civil or criminal tax investigation. The Bureau further agrees that prior to the disclosure of any Federal return or Federal return information in a Possession judicial proceeding or to any party other than the taxpayer or his/her designee in a Possession administrative proceeding if the return or return information satisfies one or more of the criteria established in section 6103(h)(4)(A), (B) or (C) of the Code, the head or legal representative of the Bureau will notify in writing the Service Center Director or Assistant Commissioner (International), from whom the return or return information was received, of the intention to make such disclosure. No officer, employee or legal representative shall disclose a Federal return or Federal return information in a Possession judicial or administrative proceeding if the Service Center Director or Assistant Commissioner (International) or their delegate, within 30 days following receipt of such written notice, informs the head or legal representative of the Bureau that such disclosure would identify a confidential informant or seriously impair a Federal civil or criminal tax investigation.

2.7 Additionally, the Bureau agrees that it will notify the Assistant Commissioner (International) when, during an audit of the Bureau by the Possession Audit Agency, Federal returns and Federal return information are disclosed to the Possession Audit Agency and such information is made, part of the Possession Audit Agency's workpapers.

SECTION 3. Disclosure of Possession Returns and Possession Return Information

3.1 This Agreement and Appendix constitute the requisite authorization for the Bureau to disclose to, and permit inspection by, IRS Representatives of Possession returns and Possession return information for the purpose of, and only to the extent necessary in the administration of the internal revenue laws, or related statutes, of the United States. Any Possession returns and Possession return information so disclosed to, or inspected by, an IRS Representative become, in the hands of the IRS, "taxpayer return information" as defined by section 6103(b)(3) of the Code and may be redisclosed by the IRS only in accordance with provisions of the Code or an applicable treaty.

SECTION 4. Safeguards and Other Requirements

4.1 As an express condition for the inspection and disclosure of Federal returns and Federal return information, the Bureau agrees to comply with the safeguards and requirements prescribed by section 6103(p)(4) of the Code and any implementation of such safeguards and requirements as may be provided by regulations and published procedures including:

(a) furnishing an annual report to the IRS describing the procedures established and utilized by the Bureau for ensuring the confidentiality of such returns and return information;

(b) permitting the IRS to review the extent to which the Bureau is complying with the requirements of this paragraph; and

(c) informing in writing all Bureau Representatives and other persons to or by whom disclosure or inspection of Federal returns or Federal return information is authorized of the criminal penalties and civil liability provided by sections 7213 and 7431 of the Code for a disclosure of such returns and return information which is unauthorized by the Code.

4.2 As an express condition for the inspection and disclosure of Possession returns and Possession return information, the IRS agrees to comply with the safeguards and requirements prescribed by section 6103(p)(4) of the Code and any implementation of such safeguards and requirements as may be provided by regulations and published procedures.

4.3 Processing of Federal returns and Federal return information received by the Bureau from the IRS in the form of microfilms, photo-impressions, magnetic media or other format (including reformatting or reproduction, or conversion to magnetic media, punch cards, or hard copy printout) and transmission and storage of such Federal returns or Federal return information by or on behalf of the Bureau may be performed by Bureau owned and/or operated computer facilities, facilities shared by the Bureau with other Possession agencies, or by any other person described in section

6103(n) of the Code. In those cases where such facilities used by the Bureau are shared with other Possession agencies or operated by any other person described in section 6103(n) of the Code, the Bureau will insure the confidentiality of the Federal returns and Federal return information provided to such shared facility or person. As part of this responsibility, the terms of any contract or agreement between the Bureau and a shared computer facility or other person to whom Federal returns or Federal return information is or may be disclosed for a purpose described in this subsection, will provide, or will be amended to provide, that such person, and officers and employees of the person, will comply with the applicable safeguard conditions contained in regulations, published rules and procedures, or written communications.

4.4 Because some taxpayers may be unaware that Bureau tax officials are authorized under Federal law to obtain Federal returns and Federal return information for Possession tax administration purposes, the Bureau will publicize, in a mannersatisfactory to the IRS, that such returns or return information were obtained pursuant to specific authority granted by the Code. Similar publicity will be provided by the IRS for Possession tax information furnished to the IRS pursuant to Possession law.

SECTION 5. Limitations

5.1 Pursuant to the provisions of section 6103(p)(2) of the Code, and of Possession law, if any, charges for furnishing returns and return

information shall be governed by Article 5, paragraph 3 of the Agreement.

5.2 Under no circumstances will the Bureau permit any Federal return or Federal return information to be inspected by, or disclosed to an individual who is the chief executive officer of the Possession or any 'person other than one described in section 2 of this Appendix.

5.3 Notwithstanding any other provision of this Appendix, the IRS will not disclose or make known in any manner whatever to any person other than one described in Section 2 of this Appendix--

(a) any original, copy, or abstract of any return, payment, or registration made pursuant to chapter 35 of the Code (relating to taxes on wagering);

(b) any record required for making any such return, payment, or registration made or required pursuant to chapter 35 which the IRS is permitted by the taxpayer to examine or which is produced pursuant to section 7602 of the Code (relating to the examination of books and witnesses); or

(c) any information obtained by the exploitation of any such return, payment, registration, or record made or required pursuant to chapter 35.

5.4 Notwithstanding any other provision of this Agreement or Appendix, the Internal Revenue

Service will disclose or make known in any manner to any person described in section 2 of this Appendix taxpayer information which was obtained pursuant to a tax convention or exchange of information agreement between the United States and a foreign government only if such disclosure is authorized by both the relevant convention or agreement and the Code.

SECTION 6. Officials to Contact for Obtaining Information

6.1 Requests by the Bureau for Federal returns and Federal return information should be made to the officials named below:

(a) Requests by the Bureau for Federal return information in magnetic media should be made to the. Assistant Commissioner (International), who will be responsible for coordinating the requests with the IRS National Office;

(b) Requests for physical inspection or copying of Federal returns, or requests for audit abstracts and reports pertaining to such returns, showing addresses within the possession should be made to the Director, Internal Revenue Service Center, Philadelphia, PA, who will be responsible for making the proper arrangements for inspection or copying; and

(c) Requests by the head of the Bureau for Federal returns of taxpayers or Federal return

information relating to taxpayers showing addresses outside the possession should be made to the Assistant Commissioner (International).

6.2 Requests by authorized officers and employees of the IRS for inspection or copying of possession returns and possession return information should be made to the Director, Virgin Islands Bureau of Internal Revenue.